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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,

*Petitioner,*

*v.*

TRANS WORLD AIRLINES, INC.,
*et al.*,

*Respondents.*

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

# BRIEF OF THIRTY-ONE STATE ATTORNEYS GENERAL RESPONDENTS IN SUPPORT OF PETITIONER, DAN MORALES

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# BRIEF OF THIRTY-ONE STATE ATTORNEYS GENERAL RESPONDENTS IN SUPPORT OF PETITIONER, DAN MORALES

## INTRODUCTION

The Attorneys General of the States and Commonwealths of Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia,

Wisconsin and Wyoming ("the States"), who are filing this brief as respondents in support of the Brief of the Petitioner, Dan Morales, Attorney General of Texas, strongly urge this Court to overturn the permanent injunction issued by the court below.[1/] This unprecedented order disregards fundamental principles of federalism and disrupts the States' traditional exercise of their police powers by preventing their enforcement of their laws prohibiting deceptive advertising. By sustaining the district court's Final Judgment, the Fifth Circuit has elevated a single industry -- the airline industry -- to a sacrosanct pedestal where it may operate above state law. By its order the district court enjoined the States from:

> "initiating any enforcement action . . . which would seek to regulate or restrict any aspect of . . . airlines' air fare advertising or their other operations involving their rates, routes and/or services."

District Court Final Judgment.

This obliteration of the States' exercise of their longstanding police powers was accomplished by the court

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1. In addition to the importance of this Court's overturning the Final Judgment of the District Court on the merits, these filing States stress the importance of this Court reversing the district court's finding of jurisdiction over all of the enjoined State Attorneys General save the Texas Attorney General. Thus the States respectfully request that this Court, after deciding the breadth of the preemption clause contained in the Federal Aviation Act, grant the *petition for cert. pending* in No. 90 - 1606, and then, as the Solicitor General's *amicus curiae* brief on the petition for *writ of certiorari* urged, summarily reverse the district court's finding that it had jurisdiction over thirty-three State Attorneys General who had only appeared specially before that court to contest its jurisdiction over them.



below without any consideration of the legislative history or context within which section 105 (a) (1) of the Airline Deregulation Act of 1978 ("ADA;" Pub. L. No. 95-504, 92 Stat. 1705; 49 U.S.C. § 1305 (a) (1)) appears. Rather the court below, in conflict with well-settled preemption analysis, interpreted the words "relating to" in §105 (a) (1) so broadly as to lead to the implausible, yet implicit, conclusion that everything an airline does, from advertising deceptively to running an illegal lottery within any of our States to spur sales of airline tickets, is exempt from compliance with the laws of the state in which such activity occurs.

The court's order and its reasoning are wrong. This Brief of Thirty-one Attorneys General Respondents[2/], as well as the Brief of Petitioner, Dan Morales, the Attorney General of the State of Texas, explain the error of the decision of the court below.

## SUMMARY OF ARGUMENT

The Fifth Circuit erred in holding that the Federal Aviation Act of 1958 ("FAA;" Pub. L. No. 85-726, 72 Stat. 737; 49 U.S.C. § 1301 *et seq.*) and the Airline Deregulation Act show an express Congressional intent to preempt state enforcement of state laws which prohibit false advertising when airlines engage in false advertising within a particular state.

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2. These thirty-one State Attorneys General, who are deemed respondents pursuant to Rule 19.6 of this Court because, although parties to the case *sub judice* and subject to the order of the district court, they were not petitioners in Petition for Writ of Certiorari No. 90-1604, adopt herein by this reference the Question Presented, Opinions Below, Jurisdiction, Statutes Involved and Statement of the Case sections as set forth in the Brief on the Merits of the Petitioner, Dan Morales, Attorney General of Texas.

1. The Fifth Circuit decision contravenes the bedrock standard this Court has enunciated repeatedly: in areas where there is a long-standing traditional exercise of the states' police powers, preemption can be found only where Congress has made its intent clear and manifest. *See, e.g., Wisconsin Public Intervenor v. Mortier,* 501 U.S. ___, 115 L.Ed.2d 532, 543 (1991) and *California v. ARC America Corp.,* 490 U.S. 93, 101 (1989). Since consumer protection is an area traditionally within the exercise of the states' police power, to find preemption in a case such as the one *sub judice* requires an even clearer statement from Congress than is required in a typical preemption case. No such expression, clear or otherwise, of Congressional intent can be found in the FAA, the ADA or their legislative history. The Fifth Circuit decision upholding the actions of the district court is not only wrong on the question of preemption, but in one fell-swoop it turned the notion of limitations on federal court jurisdiction on its ear by also incorrectly deciding that the District Court for the Western District of Texas, Austin Division, could prevent, in addition to the Texas Attorney General, thirty-three other State Attorneys General, over whom the District Court clearly had no personal jurisdiction, from enforcing their respective state deceptive practices laws. To correct this egregious error, which even more directly goes to the heart of our federal system and the need to protect states' sovereignty within that federal system (*see, e.g., Gregory v. Ashcroft*, 501 U.S. ___, 115 L.Ed.2d 410, 421-423 (1991)), these filing states, again, respectfully request that this Court grant the pending *petition for writ of certiorari* in number 90 - 1606, and then as the Solicitor General advocated in his *amicus curiae* brief on the *petition for writ of certiorari*, summarily reverse the district court's improper exercise of jurisdiction over thirty-three State Attorneys General who had only appeared specially before that court to contest its jurisdiction over them.



2. Federal regulation of deceptive advertising emanates from § 411 of the FAA (49 U.S.C. § 1381). As first adopted in 1938, it was patterned after § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). The FTC Act's § 5 has been interpreted historically as coexisting with state laws regulating false advertising and deceptive business practices. *See, e.g., American Financial Services v. FTC*, 767 F.2d 957 (D.C. Cir. 1985). Likewise, from its inception, § 411 has been read to supplement, not preempt, state statutory and common law causes of action used to challenge airline deceptive practices. *See, e.g., Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. Pa. 1982); *People v. Western Airlines, Inc.*, 155 Cal. App.3d 597 (1984), *cert. denied sub nom. California v. Western Airlines,* 469 U.S. 1132 (1985); and, *State (of New York) by Lefkowitz v. Scottish-American Ass'n, Inc.,* 52 A.D.2d 528 (1st Dept. 1976). Further, this Court has interpreted the "savings clause" of the FAA, which is found at § 1106 (49 U.S.C. § 1506), as preserving state causes of action which, on the federal level, could be challenged under § 411. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303 (1976).

3. Section 105 (a)(1) of the FAA as added by the ADA only preempts state laws "relating to rates, routes, or services" of airlines. The Congressional history surrounding the addition of § 105 to the FAA makes it clear that Congress' intent was to prevent states from adopting utility type regulations which would require airlines to charge certain prices for certain flights, fly specified routes and provide specified air transportation services. Nowhere in any Congressional report or in the legislation itself is there mention of the need to change the historic regulation of deceptive advertising from an activity which permits both a state and federal presence to one which excludes the states.

4. For the same reasons that it is difficult to find in either the FAA or the ADA a "clear and manifest" statement of Congress' intent to preempt states from enforcing their false advertising laws against deceptive advertisements by airlines, there is nothing to support a finding of preemption, either by implication or because of a conflict between state deceptive advertising laws and federal law. Any relationship between airlines' "rates, routes or services" and the states' enforcement of their false advertising and deceptive practices laws against false advertising by airlines is too remote and indirect to fall within Congress' intent to prevent the adoption of utility type regulation by the states when it adopted § 105.

Accordingly, these thirty-one state attorneys general urge this Court to reverse the decision of the Fifth Circuit and the district court and rule that neither the FAA nor the ADA preempt state enforcement of state false and deceptive advertising laws against false and deceptive airline advertisements which appear in their states.

## ARGUMENT

### NEITHER THE FEDERAL AVIATION ACT OF 1958 NOR THE AIRLINE DEREGULATION ACT PREEMPTS STATE ENFORCEMENT OF STATE FALSE ADVERTISING AND DECEPTIVE PRACTICES LAWS AGAINST FALSE ADVERTISING BY AIRLINES

Price competition in the airline industry over the past decade has led some airlines to publish misleading advertisements offering fictitious ticket prices which



represent only a portion of the actual airfare one must pay to purchase the advertised ticket. Hidden in fine print, often at the bottom of the advertisements, are additional conditions and charges -- the advertised one-way fare is only available on a round trip purchase and customs and immigration fees, an international departure tax, and security surcharges are not included in the advertised price. Because these additional fees are not even included in the advertised "one way" price, which is available only on a round trip purchase, even a consumer who doubles the advertised one way fare to compute the cost of a round trip ticket will later be surprised to learn that the total cost of the ticket is higher yet. Nowhere in the advertisements is the total ticket price disclosed. *See People of the State of New York v. Trans World Airlines*, 728 F.Supp. 162, 167-168 (1989), wherein the court provides examples of the types of deceptive advertising which the states believe airlines cannot foist with impunity upon the citizens of their states. This advertising practice is an obvious attempt to deceive or mislead consumers into believing that an advertised airfare is less expensive than it really is.

It is widely agreed that the protection of consumers from unfair and fraudulent business practices is an area traditionally regulated by the states under their police powers. *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Automobile Importers of Americ et al. v. State of Minnesota*, 871 F.2d 717 (8th Cir. 1989); and *Chrysler Corp. v. Texas Motor Vehicle Comm.*, 755 F.2d 1192, 1205 (5th Cir. 1985).

The states generally exercise this power to protect consumers through statutes which proscribe fraudulent or deceptive business practices. In this action, the airlines claim that the states are preempted by the Federal Aviation Act from protecting consumers against false and misleading airline advertisements that violate state deceptive practices laws. In assessing such a claim, courts begin with the assumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and *see Wisconsin Public Intervenor v. Mortier, supra*, 115 L.Ed.2d at 543. Thus, state regulation is not preempted absent clear congressional intent to do so. *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986).

For state regulation to be preempted, there must be 1) an express congressional statement of an intent to preempt, 2) a clear indication that Congress intends to occupy the entire regulatory field or 3) a conflict between federal and state law which is impossible to resolve or in which state law stands as an obstacle to the accomplishment of the full objectives of Congress. *See Wisconsin Public Intervenor v. Mortier, supra,* 115 L.Ed.2d at 542 -543; *California v. ARC America Corp., supra,* 490 U. S. at 101; *Silkwood v. Kerr*, 464 U.S. 238, 248 (1984).

In addition, the airlines here must overcome the strong presumption against finding preemption of state law in an area – such as consumer protection against deceptive advertising – traditionally regulated by the states. *See California v. ARC America Corp., supra*, 490 U.S. at 101; *Hillsborough County v. Automated Medical Laboratories, Inc., supra*, 471 U.S. at 716. When it is claimed that Congress has preempted a field which has traditionally been occupied by the States, this Court has stated, "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act



unless that was the clear and manifest purpose of Congress.'" *Wisconsin Public Intervenor v. Mortier, supra,* 115 L.Ed.2d at 543 *quoting Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 230. As stated by this Court, the reason for such caution is that the ability to use the Supremacy Clause (US Constitution, Article VI) to tip the balance of power toward the federal government and away from state governments "is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Gregory v. Ashcroft, supra*, 115 L.Ed.2d at 423.

Thus, only an unambiguous congressional mandate would justify a finding of federal preemption of state regulation of deceptive airline advertising practices. No such unambiguous mandate is present here.

### 1. The Federal Aviation Act Does Not Expressly Preempt The States From Regulating Deceptive Airline Advertisements

Congress adopted the first regulation of the airline industry in 1938, when it adopted the Civil Aeronautics Act of 1938, 52 Stat. 973. Twenty years later Congress enacted the Federal Aviation Act of 1958. Both of these acts governed the airline industry through the use of anti-competitive federal regulations intended to nurture its early development. Under these regulations, the Civil Aeronautics Board ("CAB") repeatedly denied applications for new routes and discouraged experimentation with discount fares. *See* 1978 U.S. CODE CONG. & AD. NEWS 3737-3738. During this period advertising as well as other practices by the airline industry were required to

comply with both federal and state legal requirements. *See Nader v. Allegheny Airlines,* 426 U.S. 290 (1976).

In 1978, Congress concluded that the airline industry would be governed more effectively by market forces than by the CAB. Accordingly, it enacted the Airline Deregulation Act of 1978, as an amendment to the FAA. The ADA eliminated many of the regulations which had restricted competition among airlines. It liberalized entry into the industry, significantly reduced the CAB's authority to regulate rates and reduced access to anti-trust exemptions. *See* Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978,* 44 J. AIR L. & COM. 747, 754 (1979).

Since Congress was about to eliminate tight economic regulation of the airline industry by the federal government, it was concerned that "some states will enact their own restrictive regulatory legislation, imposing utility-type regulation on interstate airline service and fares" and thus included within the proposed legislation "a specific statutory provision precluding state interference with interstate service and fares." 123 CONG REC. 30595 (Sept. 23, 1977). To ensure that the states did not undermine the federal government's deregulation efforts, Congress in 1978 included in the ADA what is now § 105 (a) (1) which provides that:

> "[N]o State...shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation."

49 U.S.C. § 1305 (a) (1).



In 1984, the Civil Aeronautics Board Sunset Act ("Sunset Act;" Pub. L. No. 98-443, 98 Stat. 1703; 49 U.S.C. §1551) was enacted. Although it transferred administrative responsibilities from the CAB to the Department of Transportation ("DOT"), and was passed following court decisions which found no preemptive effect on state consumer protection laws by the adoption of § 105 (*see, e.g., Brunwasser v. Trans World Airlines, Inc.*, 541 F.Supp. 1338 (W.D. Pa. 1982) and *People v. Western Airlines, Inc.*, 155 Cal. App.3d 597 (1984), *cert. denied sub nom. California v. Western Airlines,* 469 U.S. 1132 (1985)), Congress expressed no need to expand the scope of § 105's preemption language or effect and therefore did not substantively amend § 105 when it adopted the Sunset Act.

Thus, the question becomes whether Congress intended to preempt state deceptive practices statutes when it originally adopted § 105 of the ADA in 1978. An analysis of Congressional intent clearly shows that the phrase "relating to rates" does not, and was not meant to, preempt the states from regulating the truthfulness with which airlines advertise their rates. The phrase only prohibits the states from regulating the prices which airlines charge.

In enacting the ADA, Congress concluded that governmental rate setting of airfares -- whether state or federal -- does not best serve the public interest and that rates should be determined by the forces of a free marketplace. Aside from these economic conclusions, Congress was concerned that inconsistent state and federal air fare regulations or tariffs would result in "situations in which carriers have been required to charge different fares for passengers traveling between two cities, depending on whether these passengers were interstate passengers whose fares are regulated by the CAB, or intrastate passengers, whose fare is regulated by a State." H.R. Rep. No. 95-

1211, 95th Cong., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3737, 3751-3752.

Section 105 reflects these concerns. It preempts the states from controlling airline ticket prices. General state proscriptions against false advertising, however, do not impinge upon these Congressional concerns about conflicting rate requirements. In fact, state laws against false advertising promote the Congressional purpose. False price advertising distorts the free market by allowing companies with higher prices to steal business from honestly advertising competitors with lower (or the same) prices because the false advertisements create the incorrect perception that the higher priced advertiser's prices are lower when in fact they are not. False advertisements thus distort the free market forces Congress tried to establish as the regulatory mechanism of airline rates and accordingly they directly conflict with Congressional goals.

Far from impeding Congressional goals, the states by enforcing their laws against deceptive price advertisements are furthering the goal of permitting the market place to set rates. State false advertising laws merely mean that an airline cannot fraudulently induce a prospective customer to purchase its tickets in the belief that the price which the customer is to pay is, in fact, lower than it really is. The states are requiring nothing more than that the airlines, like any other seller trying to make a sale, provide full and accurate information to their prospective customers. The states are neither regulating the level at which ticket prices are set nor setting the prices themselves and thus are not enforcing the sort of "utility-type" regulation which the legislative history of § 105 indicates was intended to be preempted.

As the court in *People of the State of New York v. Trans World Airlines, supra*, 728 F.Supp. at 176, stated:



> "any relationship between [the state's] enforcement of its laws against deceptive advertising and [the airline's] rates, routes and services is remote and indirect. . . . [the state] does not care about how much [the airline] charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which [the airline] advertises those matters to . . . consumers. Thus, as far as [the state] is concerned, [the airline] is free to charge $200 or $2000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is $200 if in fact it is $2000." (Brackets added.)

The states' protection of consumers from false airline advertising falls squarely within their general police protection powers. The enforcement of state consumer protection laws generally extends to any type of commercial enterprise -- irrespective of size or complexity -- which engages in such activity. There is no indication that Congress, in pursuit of the goal of deregulation, sought to single out the airline industry, as different from all other businesses which do business within the various states, and immunize them from this basic type of state regulation.

This conclusion is supported by the actions of the CAB after the adoption of § 105 (a) (1). The CAB promulgated various regulations setting forth the types of state regulation -- including, e.g., tariff filing, certification, mode of operation, flight frequency, in-flight amenities, liability insurance, bonding, capitalization, overbooking compensation, liability for damaged luggage, and charter services -- which it considered preempted under § 105.

*See* 14 C.F.R. 399 (1979). *See also* H.R. Rep. No. 98-793, 98th Cong., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2857, 2860; and H.R. Rep. No. 95-1211, 95th Cong. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3737, 3752 (the purpose of § 105 is "to prevent . . . inconsistent regulations by providing that when a carrier operates under . . . the Federal Aviation Act, no state may regulate that carrier's routes, rates or services").

Notably, the CAB did not include the regulation of deceptive airline advertising within the scope of federal preemption. Nor is there any mention of the states' inability to regulate false airline advertising in any part of the Congressional record leading up to the adoption of § 105 or the ADA. In testifying before the Subcommittee on Aviation of the Senate Committee on Commerce, Science and Transportation, the CAB expressed its views on the intent and scope of the proposed § 105 as follows:

> "The new section 105 would incorporate into the statute various court decisions which hold that the Federal government has exclusive jurisdiction to regulate rates, routes and service in . . . air transportation. The Board supports this provision. *It would only preclude state regulations which could frustrate the intent of Federal regulatory reform legislation by substituting state utility-type regulation for Federal regulation being loosened or withdrawn.*"

Hearings, 95th Congress, 1st Session, No. 95-10, 1977, p. 191 (italics added). Regulation of deceptive advertising was not one of those utility-type regulations being loosened or withdrawn by Congress.



Except for the Fifth Circuit, those courts which have considered this exact question have found no preemption of state advertising laws in the adoption of § 105 and have embraced an interpretive approach which is consistent with what had been the CAB's approach. *See People of the State of New York v. Trans World Airlines, supra*, 728 F.Supp. 162; *see also People v. Western Airlines*, 155 Cal. App. 3d 597 (1984), *cert. denied sub nom. California v. Western Airlines*, 469 U.S. 1132 (1985), wherein the court held that the enforcement of state laws designed to prevent false advertising does not constitute a law "relating to rates, routes or services" within the meaning of §105; and *Brunwasser v. Trans World Airlines*, 541 F.Supp. 1338 (W.D. Pa. 1982), wherein the court held that the plaintiff's cause of action, brought under Pennsylvania's consumer protection statute and alleging that TWA's advertisement of a special non-stop Pittsburgh to London fare was deceptive and misleading, was not preempted by federal law.

Finally, in *Alaska v. Dept. of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), the District of Columbia Circuit implicitly recognized that § 105 does not preempt state regulation of deceptive airline advertisements. In that case, several states sued the DOT over its adoption of orders permitting air carriers to advertise ticket prices without including certain taxes, fees and surcharges in the advertised amount. In the course of its decision invalidating these orders, the court found that the orders "provide the only possible basis for preemption of state regulation of surcharges other than the departure tax." *Id.*, at 444. If these invalid orders provided "the only possible basis for preemption," then § 105 on its own must not preempt state laws.

Thus, there exists in neither the ADA nor earlier legislation *any* expression -- and certainly no *clear*

expression -- of Congressional intent to preempt the states from taking action against airlines deceptively advertising the ticket prices they themselves have set. Indeed, state regulation of deceptive ticket price advertising furthers Congress' policy of subjecting the airlines to the rigors of competition, including price competition made possible through full and accurate disclosure. The airlines' reliance on § 105 as the basis for preemption of state regulation of deceptive ticket price advertising simply is wrong.

### 2. Congress Did Not Intend To Occupy The Entire Field Of Deceptive Airline Advertising

The legislative scheme adopted by Congress from 1938 forward shows the lack of Congressional intent to gather unto itself all regulation of all activities of airlines.[3/] When Congress adopted the FAA in 1958, it even added a savings clause to emphasize that dual regulation was the norm. Section 1106 of the FAA provides that "nothing contained in this chapter shall in any way amend or alter the remedies now existing at common law or by statute,

3. Questions concerning the scope of § 105's language and the states' ability to exercise their traditional police powers are not limited to this case alone. *See, e.g., Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. pending*, No. 91-502. That matter raises important issues which, while distinct from those raised in the case *sub judice*, also question what aspects of airline activities Congress meant to preempt when it enacted § 105 of the ADA. Because of the significant implications for the enforcement of state laws which provide for highway safety and fair competition, as well as the disruptive impact to the various motor carrier regulatory programs of the states, forty-six states, as *amici curiae*, have asked this Court to review No. 91-502 so that it may provide, without delay, guidance on the separate issue of the preemptive effect of § 105 in the circumstances of that case.



but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506. This provision signifies that Congress, not having expressly indicated otherwise elsewhere, did not intend to occupy the entire field of regulation of false airline advertising -- a field which has been subject to state regulation. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987), wherein this Court stated that such a savings clause can actually "negate the inference that Congress left no room for state causes of action."

To be sure, Congress has always given the federal regulatory body authority to deal with deceptive practices engaged in by airlines. Under § 411 of the FAA (49 U.S.C. § 1381), the federal agency is authorized to issue cease and desist orders to airlines engaged in, *inter alia*, unfair or deceptive practices. This provision, however, clearly was not intended to preempt the states from exercising vis-a-vis airlines their traditional powers of protecting consumers from false advertising. Section 411, which was originally enacted in 1938,[4/] was modeled after § 5 of the Federal Trade Commission Act ("FTC;" 15 U.S.C. § 45). *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); 83 CONG. REC. 6430 (May 9, 1938) (remarks of Senator Truman).

The relationship between § 411 of the FAA and § 5 of the FTC Act is significant because § 5 does not preempt state authority to enforce state laws prohibiting deceptive advertising or deceptive trade practices. Rather, the regulation of business activity by the FTC and the

4. The provision was first enacted as section 413 of the Civil Aeronautics Act of 1938, and was repealed and reenacted as section 411 in the Federal Aviation Act of 1958. Section 411 authority was transferred to the DOT in the CAB Sunset Act of 1984.

states has a long history of co-existence. *See American Financial Services v. FTC* 767 F.2d 957, 989 (D.C. Cir. 1985); *Katherine Gibbs School (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979); *Double-Eagle Lubricants, Inc. v. State of Texas*, 248 F.Supp. 515, 517 (N.D. Tex. 1965), *appeal dismissed*, 384 U.S. 434 (1966). The FTC has itself encouraged the adoption of state deceptive practices laws because problems in the marketplace go beyond the enforcement capabilities of the federal government. *See* D. Pridgen, CONSUMER PROTECTION AND THE LAW § 3.02[1] (1986).

In fact, on numerous occasions both the FTC and state law enforcement officials have taken enforcement action against the same offending business enterprise. *See, e.g., In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975), *aff'd sub nom. Turner v. F.T.C.*, 580 F.2d 701 (D.C. Cir. 1978), *State ex rel. Sanborn v. Koscot Interplanetary, Inc.*, 512 P.2d 416 (Kansas 1973) and *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624 (Iowa 1971).

Thus, with respect to every industry in the United States that is subject to the deceptive trade practice jurisdiction of the Federal Trade Commission, Congress and the courts have rejected a policy of exclusive federal regulation of deceptive acts and practices. In view of that fact, it is unlikely that Congress, in adopting a regulatory scheme modeled on § 5 of the FTC Act, would have discarded its policy of dual state and federal regulation without comment. There was no express preemption provision in the Civil Aeronautics Act of 1938.

Similarly, there is no mention in any of the legislative history of that act of any intent to establish an exclusively federal system of regulation of deceptive advertising by the airline industry. Moreover, when § 411



was added to the Federal Aviation Act of 1958, there was still no indication that Congress intended that the power to regulate deceptive airline advertising would reside solely in the CAB. For this reason, in *Nader v. Allegheny Airlines, supra*, 426 U.S. 290, this Court specifically held that the existence of § 411, which gives the federal agency jurisdiction to deal with deceptive airline practices, does not preempt a state law claim brought against an airline for fraudulent misrepresentation.

The airlines in this matter contend that a House Committee Report accompanying the 1984 Sunset Act's transfer of responsibility for enforcing § 411 to the DOT demonstrates that Congress intended to occupy the entire field of regulation of deceptive airline advertisements. They are mistaken. The relevant portion of this report states:

> "The Committee believes that after CAB sunset there should continue to be authority in the Federal government to protect consumers against unfair and deceptive practices. Although these regulations touch relatively limited areas of airline operations they furnish important protections for consumers and we do not wish to see these regulations end precipitously when CAB sunsets. The authority now held by CAB (under section 411) duplicates authority which the Federal Trade Commission has to protect consumers in other industries under section 5 of the Federal Trade Commission Act. The additional authority which the Board holds under section 404 and other provisions permits it to deal with such problems as discrimination against the handicapped and smoking on aircraft.

> "These problems involve important issues of health, passenger comfort, and social policy, and in these limited areas the solutions reached by the marketplace are not always acceptable.
>
> "In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines."

H.R. Rep. No. 98-793, 98th Cong., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2857, 2860.

This report, which was drafted forty-six years after Congress enacted § 411 and six years after Congress enacted the express preemption provisions of § 105,[5]

5. Plaintiffs' reliance on this 1984 House Report in support of their argument that § 105 expressly preempts the states from taking action against deceptive airline ticket price advertisements is misplaced since the report is not a part of the legislative history of the 1978 enacted ADA and may not therefore be considered as a reliable statement of congressional intent in 1978. *See Regional Railway Reorganization Act Cases*, 419 U.S. 102 (1974), wherein this Court at 419 U.S. 132, rejected the interpretation of the effect of a statute put forward by thirty-six members of Congress in their *amicus curiae* brief, stating that the Congressmen's post passage statements "represent only the personal views of these legislators, since the statements were [made] after the passage of the Act.' *National Woodwork Manufacturer's Ass'n. v. National Labor Relations Board*, 386 U.S. 612, 639 n. 34 (1967)."; *see also Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980).



indicates only that Congress intended to transfer to DOT the CAB's authority to enforce its regulations and issue new regulations. There is no indication in this report that Congress in 1984 intended to dismantle the dual system of regulation that had existed since 1938. Had Congress intended to do so, it would have expressly said so. The reference in the report to the preemptive effect of properly adopted specific, and limited, CAB regulations does not suggest otherwise.

The Report listed the specific areas of regulation Congress was concerned with, including "over booking and denied boarding compensation, limitations on liability for lost or damaged baggage, smoking, discrimination against the handicapped, terms of charter service, and the notice which airlines must give passengers of contractual terms between the passenger and the carrier." *Id.* But nowhere does the Report list deceptive advertising as an area requiring an exclusive federal presence. In fact, it implicitly excludes that area when it narrows its concerns to those areas where states "might begin" to regulate -- states were already regulating deceptive airline advertising and the courts were upholding deceptive advertising laws against preemption challenges as applied to airline advertising. *See People v. Western Airlines, supra*, 155 Cal. App. 3d 597.

Preemption occurs in a dual system of regulation only when specific federal enactments conflict with state law. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). Thus, the mere mention by Congress that federal regulations in an area have a preemptive effect does not, as the airlines have urged, compel the conclusion that Congress, in merely transferring to DOT the responsibility for administering § 411, intended to occupy the entire field of deceptive airline advertising regulation.

### 3. There Is No Conflict Between State Law And Any Valid Federal Law

The question then becomes whether, when a state interprets its deceptive practices law to require that the advertised price of an airline ticket must be truthful and set forth the entire price a consumer must pay to purchase the advertised ticket, such an interpretation is in conflict with any federal law.

The requirement that airline advertisements of ticket prices disclose the total amount of the fare is consistent with valid federal regulations which govern ticket price advertisements. In December, 1984, the CAB promulgated a regulation which provides:

> "The Board considers any advertising or solicitation by a direct air carrier, indirect air carrier, or an agent of either, for passenger air transportation, a tour (i.e., a combination of air transportation and ground accommodations), or a tour component (e.g., a hotel stay) that states a price for such air transportation, tour or tour component, *to be an unfair or deceptive practice, unless the price stated is the entire price to be paid by the customer to the air carrier, or agent, for such air transportation, tour, or tour component.*"

14 C.F.R. § 399.84 (italics added); *see also* 14 C.F.R. § 380.80 (governing public charters).

Thus, a CAB enacted regulation, which was adopted by DOT when it took over from the CAB, requires that the ticket price advertised be the total cost of the ticket, including any applicable surcharges or taxes. This



regulation is entirely consistent with the interpretation of state law which is urged by the states and which the airlines are now challenging.[6/]

In this proceeding, however, the airlines have argued that such an interpretation of state law is in conflict with three subsequent DOT orders and is therefore preempted by them. Again the airlines are incorrect. These three orders are invalid and may not, therefore, preempt any state law.

The first of these orders, DOT Order 85-12-68, was issued on December 31, 1985 and permits airline advertisers to separate from the total price the $3 international departure tax without having to display the total price anywhere in the advertisement. The second of these orders, DOT Order 88-3-25, was issued on March 10, 1988, and permits air carriers to exclude eight various surcharges and fees from the advertised price as long as the excluded amounts are stated elsewhere in the advertisements as add-ons. There is no requirement that the total price of the fare be displayed. The third of the orders, DOT Order 88-8-2, was issued on August 2, 1988 and clarified the March 10, 1988 order by specifying, *inter alia*, that the advertised price of an airline ticket need not include any carrier fees or surcharges approved by the U.S. Government for separate imposition on individual

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6. Additionally, Congress has, at a minimum, also expressed its view that full ticket price advertising is desirable. Pursuant to 26 U.S.C. § 7275 advertisements which state the cost of an airline ticket shall, with certain exceptions, state such cost as the *total* of 1) the amount to be paid for such transportation *plus* 2) various taxes, including an international departure tax, imposed by 26 U.S.C. § 4261. *See* 26 U.S.C. § 7275(b)(1). Although the statute also allows an advertiser to state the cost of the taxes separately, it nevertheless requires that the total fare be stated at least as prominently as its components.

passengers as long as such charges are stated elsewhere in the advertisements.

In *Alaska v. Dept. of Transportation, supra*, 868 F.2d 441, the District of Columbia Circuit invalidated the March 10, 1988 and August 2, 1988 DOT orders. In its decision, the court found that these orders were legislative, as opposed to interpretative, rules and, as such, must be adopted in a manner which complies with the Administrative Procedure Act ("APA") notice and comment requirements and procedures (5 U.S.C. § 553 (b)(c)). Since DOT failed to employ these procedures, the orders were deemed to be invalid. 868 F.2d at 447.

Although the Court in the *Alaska* case did not specifically address the issue of the invalidity of the December 31, 1985 order, that order nevertheless is indistinguishable from the other two orders with respect to its procedural invalidity. Like the two invalidated orders, it is a "legislative rule recognizable by virtue of its binding effect." *Id.*, at 445. Like the two invalidated rules, it was promulgated without adherence to the APA procedure applicable to legislative rules, which requires notice and comment. The order is, therefore, procedurally invalid and has no binding effect.[7/]

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7. This Court should not countenance the airlines' attempt in this proceeding to give this order preemptive force merely because the order has not, until now, been procedurally challenged. Although a petition seeking review of the order was not filed within 60 days of its entry (*see* 49 U.S.C. § 1486(a)), the "summary promulgation" of this order requires that the procedure which the agency followed in its issuance be reviewable in a proceeding where the validity of the order is invoked. *See RSR Corp. v. Donovan*, 747 F.2d 294, 300 (5th Cir. 1984); *Deering Milliken, Inc. Unity Plant v. Occupational Safety and Health Review Commission*, 630 F.2d 1094, 1099 (5th Cir. 1980).



In addition, the December 31, 1985 order is substantively invalid. It is well established that "where an administrative regulation conflicts with a statute, the statute controls." *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983). *See also, Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 677-678 (5th Cir. 1978) ("the agency cannot do what Congress by statute precludes"); *Meade Township v. Andrus*, 695 F.2d 1006, 1009 (6th Cir. 1982) (holding that where an agency promulgates a regulation which is inconsistent with a governing statute, courts are constrained to declare the regulation invalid).

Likewise the rule applies in this situation. Following proper notice and comment procedures, the "law" in the form of a regulation, 14 C.F.R. § 399.84, was adopted by the CAB in 1984 and readopted by the DOT -- it declares the practice of non-disclosure of the total ticket price when a price is advertised to be deceptive and unfair. Without following proper procedures to amend the "law," DOT issued an order which conflicts with the "law." Since DOT's December 1985 order permits the airlines to do otherwise than follow the "law," it is, for this reason, invalid on substantive grounds.[8/]

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8. Courts have held that there is no time limit on challenging the substantive statutory authority of an agency to adopt a rule. *See State of Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985), *cert. denied sub nom. Interstate Commerce Commission v. State of Texas*, 472 U.S. 1032 (1985); *Alabama Association of Insurance Agents v. Bd. of Governors of the Federal Reserve System*, 533 F.2d 224, 235 (5th Cir. 1976), *vacated in part*, 558 F.2d 729 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) ("we would partially abdicate our judicial duty if we were to allow the time limit for direct review to validate forever this regulation, which has never been judicially tested, from scrutiny as to its consistency with Congressional mandate"). *See also Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958) *cert. denied*, 361 U.S. 813 (1959).

The states' interpretation that their deceptive practices laws require airlines to include the total cost of an airline ticket in their advertised fare is thus consistent with binding federal law. There simply is no conflict between federal law, valid federal regulations and state law. State enforcement of state deceptive practices laws are therefore not preempted.

## CONCLUSION

Both to restore the inherent balance of federalism and for the reasons expressed above, the Court should reverse the ruling of the Fifth Circuit that the Federal Aviation Act, § 105 (a) (1), preempts states from enforcing their deceptive practices acts against false and deceptive airline advertising which appears in their states.

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